U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

B4

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUN 18 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center initially approved the employment-based petition. Upon subsequent review of the record, the director properly issued a Notice of Intent to Revoke and ultimately revoked approval. The petitioner submitted an appeal to the Administrative Appeals Office (AAO) on May 24, 2002. The AAO affirmed the director's decision. The matter is now before the AAO on a motion to reopen and reconsider the previous decision. The motion will be granted. The appeal will be dismissed.

The petitioner is a South Korean government-sponsored international trade and investment promotional organization. The Los Angeles branch was established in November 1962 as a non-profit foreign agent. The petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

In the initial petition, filed in 1998, the petitioner sought to employ the beneficiary as its director with 11 employees under his supervision. The director approved the petition in January 2000, based upon a general description of the beneficiary's duties and an organizational chart showing the beneficiary as director with three departments under his supervision. The organizational chart indicated that each department had a deputy director and one to three staff members.

The beneficiary submitted an I-485, Application to Register Permanent Residence or Adjust Status, in March 31, 2000. In the process of adjudicating the I-485, the director issued several requests for further evidence including a December 2001 request for the petitioner's current organizational chart describing its managerial hierarchy and staffing levels and copies of the petitioner's California Forms DE-6, Employer's Quarterly Wage Report. In response, the petitioner provided an organizational chart showing the beneficiary had been demoted to the position of deputy director of the trade promotion and general affairs division. The organizational chart indicated that the beneficiary supervised two managers and two consultants. The petitioner's California Forms DE-6 confirmed the employment of one of the employees under the beneficiary's supervision. Checks issued to both consultants confirmed the petitioner had used the services of the two consultants.

In the subsequently issued Notice of Intent to Revoke, the director observed that the petitioner was a small company that already had two executives and did not need an executive for each division composed of only three or four employees. The director also observed that the beneficiary would not be performing in the capacity of an executive because "the beneficiary only has three subordinate employees, therefore, he must be assisting in the performance of the non-executive and non-managerial duties because there aren't enough employees left to perform them." The director further observed that the petitioner had not provided a description of the employees' job duties and, as such, the director could not determine that the beneficiary's subordinate employees were in professional positions.

In rebuttal, counsel for the petitioner stated that the record substantiated that the petitioner was not a small company but had nine branch offices in the United States and 101 offices worldwide. Counsel also contended that the director placed undue emphasis on the size of the petitioner's operation and that the director's observation that there were not sufficient employees to perform the non-executive tasks revealed the director's misunderstanding of the nature of the petitioner's operation. Counsel also included job descriptions for the employees under the beneficiary's supervision and asserted that the positions were professional.

Counsel noted that one employee under the beneficiary's supervision was in the United States in A-2 non-diplomatic representative status and was exempt from U.S. income tax, and thus, was not included on the petitioner's California Form DE-6. Counsel included letters and facsimile communications to show that the beneficiary acted as a promoter of Korean trade and responded to inquiries involving substantial investments and trade opportunities. Counsel finally asserted that since trade and investment promotion formed the purpose of the organization, management of the Los Angeles Office division of trade promotion is an essential function of the worldwide organization. Counsel again stated that the director placed undue emphasis on the number of employees in the division under the beneficiary's management.

The director determined that the evidence submitted did not overcome the grounds for revocation cited in the Notice of Intent to Revoke. The director determined that the petitioner had not established its "reasonable need for five executives and four mangers – especially considering that there are only eight non-managerial or non-executive employees." The director also determined that the beneficiary's three subordinate employees were not employed in managerial or professional positions.

On appeal, counsel for the petitioner again took issue with the director's characterization of the petitioner as a small trade promotion company. Counsel also observed that the statute requires that a company's size alone may not be the determining factor in denying a visa to a multinational manager or executive, without taking into consideration the reasonable needs of the organization; instead the executive's duties must be the critical factor.

Counsel contended that the director did not evaluate the petitioner's evidence submitted to support the petitioner's description of the beneficiary's duties. Counsel specifically noted that the beneficiary had been classified as a foreign government official pursuant to section 101(a)(15)(A)(l)(ii) of the Act as an alien representing a foreign government in a planning or supervisory capacity for many years. Counsel also referenced "evidence that the beneficiary performs duties of an executive/manager" including:

1. Certification of employment with the petitioner since 1975, as well his [sic] promotion and success in management and executive positions; indicating that the beneficiary has the executive and supervisory experience;
2. Letters from U.S. Corporations soliciting substantial investment and trade, to which the petitioner requires responses to be made by top-level executives, indicating ultimate responsibility for the control and operation of the office;
3. Evidence of the petitioner's activities, including income and expense details; and tax records, indicating top level wages;
4. Income Tax returns, lease agreements, payroll records[;]
5. The job descriptions of the beneficiary's subordinates which reflect professional duties and supervision of two other professional staff persons, indicates managerial capacity[.]

Counsel also took issue with the director's paraphrasing of the beneficiary's subordinates' job duties, and the director's conclusion that the duties included general tasks that could be learned on the job and did not require college degrees. Counsel also indicated that the positions of economist and management consultant required baccalaureate degrees.

Counsel argued that the director disregarded uncontroverted evidence that the majority of the beneficiary's duties would be devoted to executive/managerial duties. Counsel also observed that the director admitted that the petitioner had eight non-executive employees but then concluded that the majority of the beneficiary's time would not be devoted to executive duties because there were not enough other employees to do the menial tasks involved in the petitioner's business. Counsel referenced *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991) and *Systronics Corp. v. INS,* 153 F. Supp.2d 7, 15 (D.D.C. 2001) and asserted that, based on these decisions, the director's decision must be based on a review of the actual duties performed and other matters reflecting that the operation is a shell company, or if a small operation, that the majority of the duties performed by the beneficiary are distinguished from those of non-executive subordinates. Counsel contended that the director refused to recognize the uniqueness and complexity of the positions subordinate to the beneficiary. Counsel asserted that the Korean government staffed these positions with highly paid experts and that the petitioner required degreed professionals for the subordinate jobs.

Counsel concluded that the revocation was improperly issued because the Notice of Intent to Revoke was based on unsupported statements, unstated presumptions, and evidence not required by statute or requested by [Citizenship and Immigration Services (CIS)].

The AAO affirmed the director's decision in a perfunctory decision observing that: (1) the director had limited information regarding the beneficiary's alleged duties as a director of the petitioner; (2) the director had a brief description of the beneficiary's duties that did not adequately convey an understanding of the beneficiary's purported managerial or executive duties on a daily basis; (3) the director did not have any independent information supporting the petitioner's claim that it employed twelve individuals in the Los Angeles Office and limited information regarding the beneficiary's supervisory duties, if any. The AAO concluded that the record did not establish whether the beneficiary would be performing managerial or executive duties with respect to the duties generally described or would be actually performing the duties.

On motion, counsel for the petitioner asserts that the AAO inappropriately applied the law and used an analysis inconsistent with the information provided. Counsel cites case law in support of his assertions. The regulation at 8 C.F.R. § 103.5(a)(3) states, in pertinent part:

> A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Counsel has provided sufficient information to reopen and reconsider the previous proceeding.

Counsel asserts that the AAO sustained the director's revocation in error. Counsel states that while "the AAO acknowledged that [CIS] bore the burden of demonstrating good and sufficient cause to revoke an approved employment[-]based preference petition, it ignored the fact that demonstration of good and sufficient cause required it to produce substantial evidence to convincingly disprove the evidence presented in support of the petition." Counsel supports this statement by citing *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, (D.D.C.1988).

Counsel's interpretation is not persuasive. Section 205 of the Act, 8 U.S.C. 1155, states: "The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

> In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988) (citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

Moreover, CIS regulations affirmatively require an alien to establish eligibility for an immigrant visa at the time an application for adjustment of status is filed. *See* 8 C.F.R. § 245.1(a). If the beneficiary of an approved visa petition is no longer eligible for the classification sought, the director may seek to revoke his approval of the petition pursuant to section 205 of the Act, 8 U.S.C. § 1155, for "good and sufficient cause." Notwithstanding the CIS burden to show "good and sufficient cause" in proceedings to revoke the approval of a visa petition, the petitioner bears the ultimate burden of establishing eligibility for the benefit sought. The petitioner's burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

Counsel's citation to *Lu-Ann Bakery Shop, Inc. v. Nelson, supra* is not on point and misstates the *Lu-Ann* Court's interpretation of *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman.* The Lu-Ann Court citing *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman* indicates that the good and sufficient cause "requirement has been held to mean that [CIS] must have 'at least... substantial evidence' to justify revoking its decision to approve the petition" and that "this requirement does *not* mean that the agency has to disprove convincingly all of the evidence presented on behalf of the alien." (Emphasis added.) Counsel's assertion that the AAO ignored the fact that demonstration of good and sufficient cause "required it to produce substantial evidence to convincingly disprove the evidence presented in support of the petition" contradicts the Lu-Ann Court's actual language.

In this matter, the petitioner offered a director's position to the beneficiary. When CIS reviewed the record and determined that the record did not support the approval, CIS requested additional evidence. Upon review of the requested evidence in support of the issuance of the immigrant visa, CIS found that the petitioner had changed the beneficiary's position to a deputy director position. Not only did the petitioner fail to support the beneficiary's position as director of three departments consisting of 11 personnel, the petitioner offered evidence that the beneficiary had been demoted to the position of a deputy director of one of the three departments with three to four personnel under his supervision. The petitioner's material and significant change to its organizational hierarchy and demotion of the beneficiary precludes the establishment of

eligibility for the benefit sought.[1] The director had good and sufficient cause to revoke approval of the petition, as the petitioner had not discharged its burden of establishing eligibility when the petition was filed up to the issuance of an immigrant visa.

Counsel asserts that the AAO ignored that the beneficiary had 23 years of experience with the petitioner, had taken additional specialized training in foreign trade, and had been progressively promoted to positions of greater responsibility and remuneration. Counsel's assertion is not persuasive.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily
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> i. manages the organization, or a department, subdivision, function, or component of the organization;
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> ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
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> iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
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> iv. exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

> The term "executive capacity" means an assignment within an organization in which the employee primarily
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> i. directs the management of the organization or a major component or function of the organization;

[1] The petitioner's demotion of the beneficiary undermines the petitioner's structural integrity and suggests that a beneficiary's place on the organizational chart and accompanying duties are dependent on the processing of immigrant visas.

ii. establishes the goals and policies of the organization, component, or function;

iii. exercises wide latitude in discretionary decision making; and

iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The beneficiary's experience with the petitioner does not establish that the *director's position* offered to the beneficiary is a managerial or executive position. When examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The petitioner indicated that the beneficiary was responsible for "planning, implementing, and executing [the petitioner's] office policies and objectives," and "direct[ing] overall trade and investment promotion activities through subordinate professionals in Administration, Market Research, Investment, Trade Promotion, and Trade Fair & Exhibition divisions," and "planning of marketing strategy for the promotion of trade and investment between the United States and Korea, South and North Korea." As observed in the AAO's previous decision, these conclusory statements do not convey an understanding of the beneficiary's daily duties. The petitioner further indicated that the beneficiary would "[s]upervise professional managers and staff engaged in trade consulting service, trade information and telecommunication such as LAN (Local Area Network), public relations and publications, etc." However, the petitioner did not provide documentary evidence of the employment of managers or staff and did not provide job descriptions that would substantiate that any of the employees would be employed in a professional capacity. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Furthermore, the beneficiary's history with the organization, as well as the beneficiary's training, do not establish that the actual position comprises primarily managerial or executive tasks, rather than requires performing the actual tasks associated with the business of the organization. When considering the nature of the petitioner's business and the beneficiary's role as demonstrated by letters and emails[2] between the beneficiary and various United States businesses, it is the beneficiary providing the information necessary to bring the various businesses together. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Finally, counsel does not explain the beneficiary's purported progressive promotion to director and subsequent demotion to a deputy director who would implicitly have less responsibility. Again, the record before the director in March 2002 contained good and sufficient cause to issue a Notice of Intent to Revoke.

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[2] The record does not contain letters, emails, or other evidence of the beneficiary's role while purportedly holding the position of "director" of the organization.

The petitioner in the rebuttal to the Notice of Intent to Revoke and in the subsequently submitted appeal failed to address the significant and material change in the beneficiary's position. The AAO properly considered the limited evidence in the record relating to the petitioner's proffered position of "director" to the beneficiary. The evidence in this regard did not establish that the beneficiary's assignment within the organization would be primarily managerial or executive.

On motion, counsel raises concerns regarding the AAO's paraphrasing of the director's decision and the director's paraphrasing of the duties of the employees/consultants subordinate to the beneficiary's position as deputy director and the AAO's failure to consider these subordinates' duties. The AAO acknowledges that paraphrasing descriptions and decisions may cause confusion or mislead the reader; however, in this matter, counsel's observations regarding the paraphrased duties or decision do not lead to or cause a different conclusion. Whether the AAO observed that the director found that the beneficiary's subordinates' duties were unclear or whether the director's decision said that a particular subordinate did not correlate to the petitioner's organizational chart, the fact is that the petitioner did not support its descriptions with consistent evidence. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California, supra.*

Counsel also fails to comprehend how CIS could find the beneficiary's initial job description adequate for approval but inadequate because of a change in the petitioner's organizational hierarchy. As stated previously, the initial job description for the beneficiary's position as director, was general and specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava, supra.* The initial record [3]contained two significant deficiencies regarding the executive or managerial capacity of the beneficiary's proffered position: (1) the description of the beneficiary's proposed duties was vague; and, (2) the petitioner did not describe the duties of subordinate employees. The record did not support the approval of the initial petition.

The petitioner's demotion of the beneficiary to a position subordinate to the proffered position cannot elevate the beneficiary's actual duties to a managerial or executive position. Whether the beneficiary's actual position of deputy director comprises duties that are executive or managerial is the issue for another proceeding. However, the AAO clarifies that it did not consider the duties of the employees/consultants subordinate to the beneficiary's position as deputy director as these duties were and are not the primary issue

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[3] Counsel asserts that the AAO failed to consider the extensive information describing the beneficiary's duties as listed in items 2-14 of the cover letter submitted with the petition dated 12/12/1998. However, the cover letter in the record provides information regarding the beneficiary's duties prior to his assignment in the United States and provides only a general description of his proposed duties for the petitioner. The exhibits attached to the petition include Form ETA 750 Part A, Application for Alien Employment Certification, the beneficiary's passport, the petitioner's organizational chart, a certificate of employment with the petitioner and a certificate of experience with the petitioner, certificate of graduation and transcripts, the statute of the Korea Trade-Investment Promotion Agency, and the Korea Trade-Investment Promotion Agency Act, and correspondence attached to the petitioner's activity report to the United States Justice Department. A thorough review of these documents does not provide a detailed description of the beneficiary's proffered position.

in establishing the beneficiary's eligibility as director of the petitioner's organization. The petitioner did not provide details on all the positions subordinate to the beneficiary's position of director, but focused on the three under the beneficiary's new position. This information is not sufficient, in and of itself, to establish that the beneficiary's assignment as a director is primarily managerial or executive. As referenced in the AAO's previous decision, the beneficiary's new position constitutes a significant change in the beneficiary's assignment, thus requiring a new petition.

Counsel also cites the petitioner's volume of trade promotion activity as "reflected by the list of activities and expenses contained in the record, which indicate $906,971.77" during the October 1999 through March 2000 period and observes that CIS does not appear to question the international nature and complexity of the petitioner's activities. Of note, the record shows that the petitioner and its employees act as middlemen in bringing together United States businesses and Korean businesses to further each business' goals. Although this is a beneficial endeavor, it is not possible to conclude that the petitioner's volume of trade promotion activity must result in a finding that the beneficiary's assignment as director is primarily managerial or executive. The record suggests that the beneficiary performs the essential task of the petitioner, which is promoting trade and investment between the United States and other countries by introducing various businesses. The petitioner has not established whether performing the tasks associated with promoting trade and investment has always been the beneficiary's primary assignment or whether the proffered position of director included primarily managerial or executive duties. However, the petitioner has shown that the beneficiary's assignment subsequent to the approval of the petition but prior to the adjustment of status included performing operational duties associated with promoting trade and investment.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS,* 153 F. Supp.2d 7, 15 (D.D.C. 2001). In this regard, the petitioner did not initially submit independent evidence of its number of employees. Subsequently the petitioner submitted its California Forms DE-6, Employer's Quarterly Wage Return and evidence that one employee was classified as an A-2, alien representative of a foreign government, thus was not included on the petitioner's California Form DE-6. The petitioner for the first time on motion submits evidence that five other of the petitioner's employees are in A-2 status. The director initially did not have independent evidence establishing the petitioner's number of employees. More importantly, the director did not have information that the petitioner required an executive because the petitioner had not established it employed sufficient personnel to relieve the beneficiary from performing menial tasks. Of further importance, the petitioner had not provided job descriptions for any of the petitioner's employees to sufficiently establish that the beneficiary would not be required to provide the essential services of the organization.

Counsel also references the beneficiary's level of pay, executive, or supervisory experience, and the location of beneficiary's position in the organizational structure. Although the beneficiary's level of pay and experience may demonstrate that the beneficiary would be qualified to perform in a managerial or executive capacity, this information does not establish that the proffered position is primarily managerial or executive.

In sum, the record does not demonstrate that the beneficiary's proffered assignment of director has been or would be primarily managerial or executive. The petitioner has not established that the proffered position of director is a managerial or executive position. The record lacks evidence demonstrating that the beneficiary performed or would perform in a primarily managerial or executive capacity.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met. The motion to reopen and reconsider is granted. The previous decisions of the director and the AAO are affirmed.

ORDER: The motion to reopen is granted and the previous decisions of the director and the AAO are affirmed. The appeal is dismissed.